

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1378

To be argued by
GERARD M. DAMIANI

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-1378

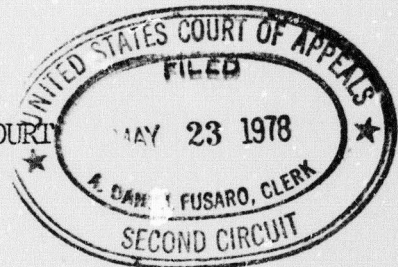
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P/S

UNITED STATES OF AMERICA,
APPELLEE,

-v.-

JOHN J. O'CONNOR
DEFENDANT APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



APPELLANT JOHN J. O'CONNOR'S REPLY BRIEF

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POINT I

THE GOVERNMENT'S CLAIM THAT UNCONNECTED PRIOR
SIMILAR ACT TESTIMONY WAS ADMISSIBLE TO SHOW
A UNIQUE SCHEME, TO CORROBORATE THEIR WITNESSES'
TESTIMONY, AND FOR IDENTIFICATION PURPOSES ARE
INCORRECT, SINCE THE ALLEGED ACTS WERE NOT UNIQUE,
DID NOT CORROBORATE THE CHARGED ACT TESTIMONY
AND WAS NOT ADMISSIBLE TO BOLSTER CREDIBILITY,
AND IDENTITY WAS NOT IN DISPUTE.

In its Brief, the Government claims the prior similar
act testimony was properly admitted for three purposes: to identify
the charged acts as the "unique handiwork" of the defendant; to
corroborate the testimony of the charged - act witnesses; and to
prove defendant O'Connor's identity. These claims will be treated
individually below.

A.

UNIQUE HANDIWORK

The Government claims in it's Brief (G.8)* that the
alleged similar act bribes exhibited a common scheme or general
plan on Mr. O'Connor's part to use his position as an inspector
to obtain pay-offs. The Government claims that the "similar acts
are admissible because they showed the same unique scheme and
pattern revealed in the crimes charged . . . [and] are thus identi-
fiable as the handiwork of the defendant and admissible on that
basis." This claimed "unique handiwork" is summarized by the
Government as the following:

* References to the Government's Brief are by a G. followed by a
page number.

"The crimes were committed by O'Connor in his position as a meat inspector; the payments were not only made hand to hand and in cash, but they were all made if possible, on the same day - Friday and were made every week. In addition, they usually took place in the plant office while O'Connor was putting the brands away and usually nothing was said by either of the parties." (G.8) (emphasis supplied)

It is well that the above claim is hedged about with equivocal qualifiers. Unfortunately, the Government's Statement of Facts is larded with inaccuracies which show the strain inherent in the attempt to eke out a special uniqueness where none exists.* Examining these supposed distinguishing characteristics only demonstrates how absurd the Government's claim is. These are not

* Among other things, the Government claims that payments at West Harlem were made on Friday and apparently nothing was said (G. 3-4). Actually, payments allegedly were usually made on Friday, and were accompanied by a "Thank you" or "You're welcome". (T.107. At Strassburger, the Government claims payments were made on Friday, hand to hand, and that apparently nothing was said (G.4). Actually, these payments allegedly often took place on Monday or Thursday as well as Friday, and there is a complete absence of evidence regarding hand to hand payments and that nothing was said (T.157-159). It is claimed that payments at Kupferberg were made hand to hand and nothing was said (G.4). Actually, the testimony alleged that money would be either handed to O'Connor or put in his white jacket pocket. There is no testimony that nothing was said on these occasions (T.214).

Not only are there errors in the claimed facts in individual meat houses, but the Government claims too much in the various groups of similarities. For instance, the Government claims that "usually nothing was said by either party." (G.8). Of the three charged acts, review of the transcript reveals that allegedly there were words exchanged at West Harlem (T.107), and that there is no testimony regarding whether or not anything was said at Strassberger and Kupferberg. Of the three similar acts, only the representative of Korn testified that nothing was said (Q. "Would you have any conversation with him?" A. "no, sir." (T. 354). Vorcheimer gave an equivocal answer (Q. "Did you say anything to him?" A. "Not -- not in particular. Not on every occasion." (T.297)). There is no testimony on this point from Omaha.

Thus, the 'similar acts' were neither similar to one another nor similar to the charged acts in this respect.

devices which are "so unusual and distinctive as to be like a signature." McCormick on Evidence §190 P. 449 (Rev. ed. 1972). These are mundane, trivial and pedestrian similarities.

Even if there were similarities here which had some significance, these are characteristics chosen by the bribe-giver and not the bribe-taker. They would be, therefore, not "signatures" of the defendant, but rather indications of the most natural, expected, and common manner of bribe-giving.

The Government claims that the prior similar act testimony should be admitted because, in effect the two classes of acts, charged acts and similar acts display a striking uniqueness which identifies them as the handiwork of Mr. O'Connor. However, not one case had been presented supporting this claim. All the cases cited are examples of Weinstein's first two sub-categories of plan, (see Defendant's brief, pp. 33-35). They were either same or common plan or scheme introduced to complete the story of the crime on trial, or examples of a continuing plan which were part of a project directed toward completion of the crime in questions. As an example of a case in which the nature of the required uniqueness is thoroughly explored, the Court is respectfully referred to United States v. Myers, 550 F. 2d 1036, 1044-1048 (5th Cir. 1977), reversing a bank robbery conviction because of erroneously admitted subsequent similar act evidence.*

In United States v. Benedetto, Docket No. 77-1306, slip op. 1735 (2d Cir., February 24, 1978), the Court rejected a similar argument regarding the uniqueness of prior similar act testimony.

* The Court in Myers notes at p. 1044, ftn. 10, that whether the similar act testimony was prior or subsequent is irrelevant. We agree..

The Court said there at p.6:

'Similarly, we would be hard pressed to hold that Benedetto's alleged similar acts shared "unusual characteristics" with the acts charged, thereby evidencing a unique scheme or pattern. McCormick states that such evidence is admissible:

"To prove other like crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused. Here much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts. The device used must be so unusual and distinctive as to be like a signature. (Footnotes omitted, emphasis added)."

We are told there was such a "signature" here because Benedetto used "a similar technique for receiving cash; the passing of folded bills by way of a handshake." But that method of bribery is about as unique as using glassing envelopes to package heroin. If the evidence were that the money had always been passed to Benedetto in an unusual way, e.g., a requirement that the money be placed in a peculiar place,^{4/} we would have a different view.

^{4/}This was the case with one Government witness, who testified that he left the money in a coffee can each Friday.'

As noted above, the cases cited by the Government as justifying the introduction of similar act testimony because of the "uniqueness" of defendant's modus vivendi do not stand comparison to the instant case. In Brehm v. United States, 196 F. 2d 769 (D.C. Cir. 1952) the defendant, a Congressman, was convicted for illegally accepting a contribution from a Government employee for political purposes. The similar act testimony in that case was not, as claimed by the Government, evidence of similar contributions by another employer. The same employee, working in the Congressman's office at all relevant times, allegedly

gave both the similar act contributions and the chargeable contribution, and the two classes of contributions were immediately contiguous in time. The Court approved admission of this similar act testimony on the following rationale at 771:

"One of the established exceptions to the rule which forbids evidence of other offenses is that such evidence may be admitted to establish a common scheme or purpose so associated that proof of one tends to prove the other, or if both are connected with a single purpose or in pursuance of a single object."

In Brehm, the two classes of contributions were from the same person, to the same person, while the same relationship existed, over an uninterrupted and contiguous period of time and for the same purpose.

Similarly, in United States v. Laurelli, 293 F. 2d 830 (3rd Cir. 1961), the two classes of acts involved work at the same construction project. The defendant building inspector there was convicted of one count of perjury and one count of bribery. The majority permitted the introduction of the similar act testimony on the issue of intent and because it ". . . also tended to show a pattern of a type familiar in some decisions involving adultery." Laurelli at 832. This cryptic remark was supported by reference to four old state decisions. A very vigorous dissent, addressed principally to the issue of intent, claimed that 'The "decisions involving adultery", referred to by the majority are inapposite here, as their content discloses.' Laurelli at 834. In Laurelli, as in Brehm, the two classes of alleged acts were closely related, involving the very same construction project.

In United States v. Murphy, 480 F. 2d 256 (1st Cir. 1973), the Court made no ruling on the admissibility of similar act testi-

mony, since the defendant had raised no objection to its introduction and there was no plain error because of the "obvious nexus between this evidence and the offenses on trial." Murphy at 260. In dictum the Court said at 260:

' [T]he evidence in question might well have been admissible under exceptions to this rule either to show that defendant acted knowingly or willfully in accepting these payments or because it was "so blended or connected with the evidence of the offenses on trial . . . that proof of one incidentally involve d the other. . . ."

In United States v. DeSapio, 435 F. 2d 272 (2d Cir. 1970), defendant was convicted of conspiracy to extort, conspiracy to bribe and two counts of bribery. There was no claim by defendant DeSapio that similar act testimony had been improperly admitted. Defendant-appellant claimed that there was a prejudicial misjoinder. The similar act testimony which had been allowed involved co-defendants no part of that appeal, and ". . . as the judge made crystal clear to the jury, it was plain DeSapio was not involved." The issue of similar act testimony was not involved in the DeSapio decision.

Thus, in Brehm, Laurelli and Murphy, the charged acts and similar acts were part of the same transaction and proof of the two was bound closely together. Here, there was no such nexus. The similar act proof did not add an iota in terms of "quality" of proof to the Government's case. The similar act testimony in the instant case simply added to the "quantity" of the Government's case. From the jury's point of view, the thrust of the similar act testimony was that if he had done it before, he must have done it again. The similar act testimony was particularly prejudicial here where the only real issue in the case was credibility.

Mr. O'Connor repeats his claim here that if continuing plan or scheme was properly at issue in this case, and the unrelated similar acts properly admitted as the Government claims, defendant should have been permitted to introduce exculpatory evidence in the form of the FBI 302 reports of the seven (7) meat houses in Pennsylvania and ten (10) meat houses in Brooklyn (A.109-136). The Pennsylvania reports particularly indicate that O'Connor was a conscientious meat inspector who enforced federal regulations fully and fairly and never requested or received anything of value from the meathouses (A.109-112). If the Court were to hold that the prior similar acts were admissible to inculcate O'Connor in a continuing scheme, exculpatory evidence was surely relevant to negate that inference.

B

CORROBORATION

The Government further contends in it's Brief for the first time* that the prior similar act testimony was properly admitted to corroborate the testimony offered to prove that "O'Connor had engaged in the identical bribery extortion scheme in Brooklyn" and that bribes were given to "prevent O'Connor's official harassment" (G.10). There is not a shred of evidence regarding the charged acts that O'Connor had ever engaged in an act of extortion or harassment in the Southern District in order to obtain bribes.** In fact, documentary evidence was introduced proving that O'Connor had shut down Strassberger on two occasions at the very time the Government alleged payments were being made to O'Connor to avoid enforcement of the Federal Regulations (T.195-202).

The Government argues essentially that, because O'Connor cross-examined the charged act witnesses as to their credibility, the Government should have been permitted to introduce entirely unrelated similar act testimony from entirely unrelated witnesses in order to corroborate and buttress the charged act witnesses. This is not truly corroboration of the charged act witnesses. None of the similar act witnesses offered evidence corroborative of

* The Government's position, even before the trial, was that similar act evidence was admissible to show intent, lack of mistake, etc., This corroboration argument was never presented to or considered by the Trial Court.

** There was testimony by one of the similar act witnesses that O'Connor had enforced regulations less strictly when payments were made (T.355).

incidents to which the charged-act witnesses testified. They testified as to entirely different and unconnected incidents of the same sort. The similar act testimony was corroborative of only one thing -- that it was more likely that O'Connor had taken bribes from the charged-act meat houses because he had previously taken from the similar act meat houses. In other words, that O'Connor was a bad man who had committed this crime before and was more likely to have committed it again. The similar act evidence did not really tend to show that the charged act witnesses were truthful but that the defendant was corrupt. This was the real reason the Government sought to introduce the similar act testimony and, if reduced to its bare structure without the obfuscating verbiage about "uniqueness", "corroboration" and "identification" (q.v. infra) none of which were appropriate here, was the only practical effect the evidence had with the jury.

The cases cited by the Government to support its corroboration claim can all be distinguished from our own based on the above reasoning. In every one of them, the corroborative evidence involved direct buttressing of the actual claims, facts or events by the introduction of closely related evidence. In United States v. Eliano, 522 F. 2d 201 (2d Cir. 1975), for example, the defendant was convicted of three counts of willful evasion of income taxes and one count of failure to file in reference to income derived from prostitution. The witness whose testimony was corroborated was one of his prostitutes who had allegedly been the source of the unreported income and who so testified. Her credibility was attacked by defendant. The Court permitted the Government to prove defendant's prior state conviction based upon causing this very witness to engage in prostitution to show the source

of the unreported income and to corroborate her testimony. There, the facts that the witness was testifying to were in issue in the trial. Whether the witness was truthful in claiming that defendant had caused her to engage in prostitution, and do derived the unreported income, were at the core of that case. Here, it would have been as if the Government in Eliano had tried to introduce evidence that defendant had caused a completely unrelated woman to engage in prostitution some years before, or had evaded taxes in a similar but factually unconnected way in prior years. In short, each of the cases cited by the Government on the corroboration point involved prior transactions between the witness whose testimony was sought to be corroborated and the defendant.

C

IDENTITY

Lastly, the Government claims defendant raised the issue of identification by cross-examining charged act witnesses regarding defendant's absence from their meat houses at certain times during which the Indictment alleged he took bribes.* The Government claims we were, in effect, asking the jury to speculate that some of the charged act witnesses had identified the wrong meat inspector. This claim is totally without foundation in the record and, like corroboration and identity, is raised for the first time on appeal.**

As noted in our Brief, two of the three charged-act witnesses knew O'Connor quite well before he became a meat inspector (T.154, 165, 590-A. 207 b). Further, in reference to charged-act witness Kupferberg, defendant conceded identity in the Grand Jury's presence. At T.213, the following colloquy took place:

"Q. Would you please point him O'Connor out to the jury. Describe him. Mr. Damiani: We acknowledge it is Mr. O'Connor, your Honor."

* Defendant argued to the Trial Court that since the Indictment alleged weekly payments between July, 1974 and January 1975 (A.4-5) and the Government failed to prove weekly payments, the Indictment should have been dismissed. The Trial Court rejected our argument; we have not raised this point on appeal.

This line of questioning was also addressed to the credibility of the Government witnesses as to their ability to remember details concerning Mr. O'Connor.

** We object to the Government's "shotgun" approach to litigation. The Government never claimed in its Trial Memorandum or on oral argument, the three points raised on appeal to justify an admission of prior similar acts (i.e. uniqueness, corroboration and identity). The Government should be limited on appeal to consideration of those points to which the Trial Court's discretion was addressed, pursuant to their request at trial.

It was crystal clear to the jury that identity was no part of this case.

POINT II

THE PREJUDICIAL EFFECT OF THE GOVERNMENT'S
QUESTION AND THE ANSWER SOLICITED FROM THE
WITNESS, GENTILCORE, CONCERNING ALLEGED PAYMENTS
TO THE DEFENDANT FROM EMPLOYEES AT LEAST THREE
SOURCES IN BROOKLYN FAR OUT WEIGHED ANY PRESENT
CLAIM OF PROPRIETY BY THE GOVERNMENT

The government contends, in its brief, that in view of the direct examination of the witness, GENTILCORE, by defendant, that the questions asked and the answers obtained in cross-examination which are the subject of Point II in defendant's brief was proper.

The government alleges, in support of their present position, that such question and answer was designed to correct an alleged erroneous impression elicited by defendant's counsel, namely, that the agent had talked to several cooperating meat packers in Brooklyn and that they told him that they had not paid off O'CONNOR. The government's contention that these impressions were erroneous is itself erroneous.

As set forth in Point II of the defendant's brief, following the completion of the government's direct case, the defendant called, as its first witness, RICHARD C. GENTILCORE, an F.B.I. agent who was specifically assigned to defendant's case.

This witness was called by the defendant as a result of the Court's allowance of "similar act" testimony. The defendant contended that the results of the witnesses various interviews of those meat packing houses wherein the defendant was employed since his employment should be admissible as

being relevant and exculpatory evidence in view of the Court's determination to allow "similar act" testimony. (T457-59).

As a result of the government's objections, the Court precluded defendant's counsel from introducing such evidence and any present claim by the government that an erroneous impression was created is totally without merit since the Court itself instructed the jury on the very issue prior to the government's cross-examination of the witness. (See T460-462)

"Q. Mr. Gentilcore--or Agent Gentilcore, did Mr. William Chazen of Willow Packing Company, Inc. indicate to you that he made payments to Mr. O'Connor in money, meat or any other manner?

MR. LAWLER: Objection, your Honor. The question is leading.

THE COURT: Sustained.

Q. Did Jeffrey Rubin of Jacob Zucker indicate that he made payments to Mr. O'Connor in meat or money or any other form?

MR. LAWLER: Objection, your Honor. I will ask that defense counsel not be allowed to continue this form of questioning.

THE COURT: If you do, I shall tell the jury what the ruling is. Make up your mind. You may not like the Court's ruling, but you must not ask those questions. If you continue, I will have to explain to the jury why I am ruling in this manner.

MR. DAMIANI: I would prefer that you do.

THE COURT: Counsel is trying to get in evidence through this witness with respect to investigations conducted over a period of time. The law says that just because some people say, "I didn't give the defendant any money," that does not mean that the defendant did not take money from another source.

In the same manner, when the jury concludes that a defendant has violated the law with respect to one charge of an indictment, the jury is not entitled to infer that he violated the law with respect to other counts of the indictment.

That evidence is inadmissible because it establishes nothing pro and con with respect to the items submitted to the jury. Counsel has an exception to the ruling out of that line of inquiry.

MR. DAMIANI: Thank you, your Honor.

Your Honor's ruling, I assume, also concerns Defendant's Exhibit Q, pertaining to the 302 reports?

THE COURT: I have already told you that. I have ruled right at the side bar, on the record. You know that as well as I do. I told you if you did anything else or brought out anything else along that line you would have the right to renew the offer. I stand on the ruling."

Defendant respectfully submits that since the Court precluded defendant's counsel from introducing such evidence as a result of the objection of the government and the Court thereafter instructed the jury as to the admissibility of same, the government's present position that such question and answer was proper is without legal or factual merit. (See T466-468).

"MR. LAWLER: Your Honor, the defendant chose to put on Mr. Gentilcore. The defendant chose to question him about the investigation that he conducted. The defendant chose to question him about what the investigation adduced and what he did, and the Government believes it is its right solely following up on the door that was opened, wide open, by defense counsel in calling Mr. Gentilcore to the stand and asking him the questions that he did, your Honor.

THE COURT: Yes, but you foreclosed defense counsel by your own objection from developing

the affirmative of what he wanted to show.

We sustained your objection. Then what did you do? You rushed in and you showed what the inquiry did establish that is in favor of the Government. I don't think you had any right to, otherwise I would not have made the comment to the jury that I did, nor would I have gone as far as I did by inviting the motion to strike. I would have stricken it myself.

That is exactly the type of thing that must be avoided, because it is not established, factual material that can be of any value, and it must not be heard by the jury. It is only your getting in three names, so what if I had not said something to them, they would have said, "Well, there are three more people who said they paid."

That was not established by proof as to these additional things. Whether it rises to the point where a mistrial must be declared is something we ought to consider. My inclination is to say no to it, but we will talk further.

I think I will excuse the jury, so we can go into it further, or you may have some authority that you may feel supports your position. You don't have to agree with the Judge. You can be as firm your way as I feel I am when I have to make a ruling."

See also T496-497.

"Well, the questions that counsel for the defense put to the witness on direct were lengthy but innocuous, really. He never got a word out of the witness with regard to whether or not the witnesses he had gone to spoke well or ill of the defendant, nothing at all. In fact, the Government succeeded in accomplishing what it had hoped, and that is that the Judge would rule inadmissible that testimony even if the questions were properly put, whereupon counsel offered Exhibits Z and R, marked for identification as I remember it, two documents which were a part of the investigation, and I then took a position at the side bar: "Inadmissible".

Well, the Government having succeeded, what was the need for any cross-examination? How can a

lawyer lay a foundation except by asking a lot of questions: "Did you see A? Did you talk to B? Did you talk to C? Did you talk to X in the meat packing industry?" There was nothing to warrant the cross-examination, and Mr. Lawler confessed that he asked that question, that dangerous question, without knowing that those three instances related to any of the testimony that had theretofore been adduced. In other words, he was content to ask a question with regard to three additional meal packing concerns, and he knew that that was so, because he admitted it.

Now he comes into court, and he says he had a perfect right to cross-examination. The Court cannot accept that at all. What happened -- and we have to face up to it: that doesn't necessarily mean that the Court has to rule that counsel is right in moving for a mistrial, but I think that a fair analysis of what took place and that precipitated this unfortunate situation should be made clear on the record."

The government's unsupported contention that such testimony was merely cumulative of similar act evidence is equally without basis and one which would appear to be promoted by hindsight, since even after defendant's re-direct examination established that two of the three incidents referred to by the witness had already been heard in the government's direct case. The jury was left in the dark as to the third alleged incident testified to by Agent Gentilcore. (See Point II of defendant's Brief).

Surely, there was no evidence whatsoever which would reasonably establish that the rebuttal witnesses, MYRON BERNSTEIN and SAL DeANGELO, from Omaha Hotel and Supply Corporation, were in fact, the third party referred to by the witness, GENTILCORE, on the contrary, it would be more reasonable to believe that the contrary would have been inferred by the jury since the subject

question and answer of the witness, GENTILCORE, indicated that these parties had paid Mr. O'Connor. Defendant respectfully submits that the question and answer reasonably connoted payment of money whereas the testimony of the witnesses, BERNSTEIN and DeANGELO, concerned packages of meat. Thus, to say that such testimony was cumulative of "similar act evidence" and thus admissible, would appear to be an improper and erroneous conclusion.

Defendant respectfully submits that based upon the above referenced facts and cited trial testimony, not only was the government solicitation of the subject question and answer referred to in Point II of defendant's brief improper, but its prejudicial effect far out weighed any present attempt to justify its propriety.

CONCLUSION

The "similar act" testimony did not relate to intent, unique plan or identity, nor was it properly corroborative. Its admission irremediably prejudiced defendant, overwhelmed the truly relevant charges and became the focus of the trial. Additionally, defendant's motion for a mistrial should have been granted since the jury was led to believe that additional similar acts lurked in defendant's background. Further, the defendant. Further, the defendant was improperly limited in introducing exculpatory evidence. Finally, the Trial Court's charge prejudiced the jury by gratuitously introducing legislative intent, and coerced the jury by giving two Allen charges and improperly commenting on jury deliberations.

These errors, taken individually and together, denied defendant a fair trial, for which the convictions below should be reversed.

Respectfully Submitted,

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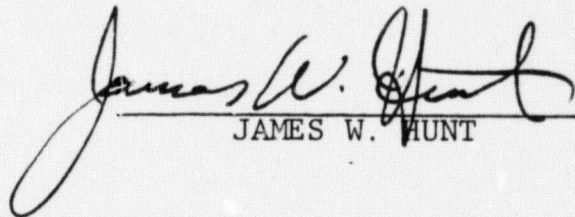
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STATE OF NEW YORK)
) SS.:
COUNTY OF ROCKLAND)

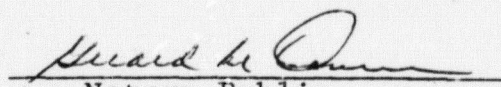
JAMES W. HUNT being duly sworn, deposes and says:

I am not a party to the action, am over 18 years of age and reside at 542D Broad Avenue, Palisades Park, New Jersey 07650.

On May 19, 1978, I served two copies of the annexed Defendant-Appellant's Reply Brief by mailing the same in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of Honorable Robert B. Fiske, United States Attorney, Southern District of New York, One Andrew Plaza, Foley Square, New York, New York.


JAMES W. HUNT

Sworn to before me this
19th day of April, 1978.


Notary Public
GERARD M. DAMIANI
Notary Public, State of New York
No. 4653010
Qualified in Rockland County
Term Expires March 30, 19